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Message Text

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JUSTICE - MR. MURPHY (INFO)
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TO AMEMBASSY BUENOS AIRES

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E.O. 11652: N/A

TAGS: PFOR, AR, US

SUBJECT: EXTRADITION TREATY CONSULTATIONS

REF: STATE 78349

1. PER REFTEL, FOLLOWING IS TEXT OF INFORMAL MEMORANDUM AND PROPOSED SCHEDULE OF MEETINGS GIVEN ARGENTINE EMBASSY MONDAY APRIL 7.

2. SCHEDULE, BEGIN TEXT.

INITIAL CONSULTATIONS (APRIL 16, 17, AND 18: 1) DISCUSS POSSIBLE SOLUTIONS TO ISSUE OF MANNER OF REPRESENTATION (ARTICLES 13 AND 19). 2) DISCUSS ARGENTINE LAW OF BEGIN UNDERSCORE ASOCIACION ILICITA END UNDERSCORE AND U.S. LAW OF CONSPIRACY. 3) DISCUSS ANY MATTERS WHICH ARGENTINE AUTHORITIES MAY WISH TO RAISE.

APRIL 18 THROUGH MAY 5: PROPOSALS EVOLVING FROM INITIAL CONSULTATIONS WOULD BE CONSIDERED BY GOVERNMENT OF ARGENTINA AND GOVERNMENT OF THE U.S.
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FINAL CONSULTATIONS (WEEK OF MAY 5): 1) FINALIZE ANY FORMAL AGREEMENTS (TEXTS OF DRAFT NOTES EXCHANGED

OR DRAFT PROTOCOL TO TREATY). DRAFTS WOULD BE INITIALED

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BY RESPECTIVE REPRESENTATIVES. 2) U.S. WOULD RESPOND TO ANY REQUESTS FROM GOVERNMENT OF ARGENTINA WITH RESPECT TO TREATY WHICH WOULD NOT FALL UNDER 1 ABOVE. 3) DISCUSS PROCEDURES TO BE EMPLOYED UNDER THE PROVISIONS OF ARTICLE 4 FOR LOCAL PROSECUTION IN U.S. AND IN ARGENTINA. END TEXT.
3. MEMORANDUM, BEGIN TEXT:

THE DEPARTMENT OF STATE WOULD DESIRE TO HAVE CONSULTATIONS ON THE TECHNICAL LEVEL BETWEEN ATTORNEYS OF THE UNITED STATES DEPARTMENTS OF STATE AND JUSTICE AND THE APPROPRIATE OFFICIALS OF THE GOVERNMENT OF ARGENTINA CONCERNING CERTAIN ASPECTS OF THE TREATY OF EXTRADITION BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF ARGENTINA, SIGNED AT WASHINGTON JANUARY 21, 1972. THE DEPARTMENT WOULD WISH THAT THE CONSULTATIONS COVER THE FOLLOWING MATTERS:

1. THE UNITED STATES GOVERNMENT IS OF THE VIEW THAT THE TREATY PROVISION GOVERNING REPRESENTATION WHEREBY THE UNITED STATES DEPARTMENT OF JUSTICE REPRESENTS THE GOVERNMENT OF ARGENTINA IN AN EXTRADITION PROCEEDING AT NO COST TO THE GOVERNMENT OF ARGENTINA, AND WHEREBY SIMILAR RIGHTS ARE GRANTED TO THE UNITED STATES GOVERNMENT BY THE GOVERNMENT OF ARGENTINA, IS IN NEED OF SOME CLARIFICATION. ARTICLE 19 OF THE TREATY PROVIDES IN PARAGRAPH 1 THAT THE LEGAL OFFICERS OF EACH COUNTRY SHALL ASSIST THE REQUESTING PARTY IN THE PRESENTATION OF AN EXTRADITION CASE. INSOFAR AS THE UNITED STATES IS CONCERNED, THE PROCEDURE WHICH WE HAVE ADOPTED AND WHICH WAS INTENDED TO BE EXPLICIT IN THE TREATY WAS AS FOLLOWS:

UPON RECEIPT OF A REQUEST FOR EXTRADITION, THE MATERIALS PRESENTED WOULD BE REVIEWED BY THE ATTORNEYS WITH THE ULTIMATE RESPONSIBILITY OF
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TRANSMITTING THE CASE TO THE COURT. UNDER OUR PRACTICE, WE WOULD INFORM THE GOVERNMENT OF ARGENTINA OF ANY LEGAL IRREGULARITIES OR DEFICIENCIES WHICH MIGHT, IN THE VIEW OF THE APPROPRIATE ATTORNEY, RESULT IN THE DENIAL OF THE REQUEST BY A JUDGE AND AFFORD THE GOVERNMENT OF ARGENTINA AN OPPORTUNITY TO SUPPLEMENT THE REQUEST IN A MANNER WHICH WOULD, AGAIN IN THE VIEW OF THE APPROPRIATE ATTORNEY, ASSURE TO THE EXTENT POSSIBLE THE LIKELIHOOD OF THE SUCCESS OF THE REQUEST FOR THE

EXTRADITION. IN PRACTICE THIS PROCEDURE HAS BEEN MOST SUCCESSFUL AND THE DEPARTMENT OF JUSTICE HAS

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RARELY FAILED TO OBTAIN A FINDING OF EXTRADITABILITY
WHEN REPRESENTING FOREIGN GOVERNMENTS IN THE PRE-
SENTATION OF EXTRADITION CASES. WE BELIEVE THIS
PROCEDURE TO BE MUTUALLY BENEFICIAL TO BOTH
GOVERNMENTS AND A VALUABLE ASSET IN OUR COMMON
EFFORT TO BRING FUGITIVES TO JUSTICE.

THERE HAS BEEN SOME INDICATION THAT DUE TO THE
DIFFERENCE IN THE LEGAL SYSTEMS OF THE TWO COUNTRIES,
THE PROCEDURES BEING EMPLOYED BY THE GOVERNMENT OF
ARGENTINA DO NOT FULLY EQUATE WITH THE PROCEDURES
AFFORDED THE GOVERNMENT OF ARGENTINA IN THE UNITED
STATES, IN A MANNER WHICH COULD BE DETRIMENTAL TO THE
INTERNATIONAL EFFORT TO COMBAT CRIME. SPECIFICALLY, THE
UNITED STATES WOULD WISH TO CONSULT WITH THE GOVERNMENT OF
ARGENTINA WITH A VIEW TO ESTABLISHING A SYSTEM OF REVIEW IN
ARGENTINA WHICH WOULD ENABLE THE UNITED STATES TO CORRECT
ANY LEGAL IRREGULARITIES OR DEFICIENCIES IN THE DOCUMENTA-
TION OF THE REQUEST FOR EXTRADITION BEFORE THE DOCUMENTS
ARE PRESENTBD TO THE COURT.

IT HAS COME TO OUR ATTENTION THAT ALTHOUGH ONE OF
THE FACTORS THAT HAS LED TO OUR CONCERN IS THE DIFFERENCE
IN LEGAL SYSTEMS, ANOTHER FACTOR MAY BE IMPROPER TRANS-
LATION WITH A CONSEQUENT MISUNDERSTANDING ON THE PART OF
THE GOVERNMENT OF ARGENTINA WITH RESPECT TO ARTICLE 13 OF
THE TREATY. INSOFAR AS THE UNITED STATES NEGOTIATORS
WERE CONCERNED, THE INTENT OF ARTICLE 13 WAS TO SUPPLE-
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MENT ARTICLE 19. THE PHRASE, "IF THE REQUESTED PARTY
REQUIRES ADDITIONAL EVIDENCE OR INFORMATION...," WAS
INTENDED TO IMPLY THAT THE REQUESTED PARTY WOULD IN
FACT REQUEST ADDITIONAL EVIDENCE OR INFORMATION SHOULD
IT BE DETERMINED THAT SUCH WAS NECESSARY. UNFORTUNATELY,
THE TRANSLATION INTO SPANISH OF THIS TEXT (WHICH WE NOW
NOTE IS ALSO CONTAINED IN THE TREATIES OF EXTRADITION
BETWEEN THE UNITED STATES AND SPAIN, URUGUAY, PARAGUAY,
AS WELL AS ARGENTINA) MAY IMPLY, BECAUSE OF THE VERB
"SOLICITA," THAT THE DECISION AS TO WHETHER ADDITIONAL
EVIDENCE SHALL BE REQUESTED IS AT THE DISCRETION OF THE
REQUESTED PARTY. THIS IS NOT WHAT WAS INTENDED AND WE
WOULD ACCORDINGLY WISH TO INQUIRE INTO THE POSSIBILITY
OF A REVIEW BY AN ATTORNEY OF THE EXTRADITION REQUEST
WHICH WOULD PERMIT THAT INDIVIDUAL TO SUGGEST TO THE
UNITED STATES, THROUGH THE DIPLOMATIC CHANNEL, THAT
ADDITIONAL DOCUMENTATION MIGHT BE NECESSARY OR THAT SOME
IRREGULARITIES NEED TO BE RECTIFIED BEFORE THE FINAL

PRESENTATION OF THE CASE TO THE MAGISTRATE TO MAKE THE
DETERMINATION ON THE REQUEST FOR EXTRADITION. ALTERNA-

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TIVELY, IF THE ARGENTINE LEGAL SYSTEM WOULD PERMIT, ONE SOLUTION MIGHT BE TO ENABLE THE MAGISTRATE, AFTER RECEIVING THE ADVICE AND RECOMMENDATION OF THE APPOINTED "FISCAL," TO COMMUNICATE TO THE UNITED STATES WHATEVER DEFICIENCIES OR IRREGULARITIES HAVE BEEN FOUND AND THUS ENABLE THE UNITED STATES TO CORRECT THE PAPERS PURSUANT TO AND LIMITED TO THE CONDITIONS ESTABLISHED IN ARTICLE 13. IF THERE WERE OTHER POSSIBILITIES WHICH WOULD ACCORD WITH THE ARGENTINE PROCEDURES WHICH MIGHT RESOLVE THE PROBLEM WHICH WE HAVE POSED, WE WOULD WISH TO EXPLORE THOSE POSSIBILITIES. IF THE ARGENTINE AUTHORITIES CONCUR, SOME CONSIDERATION MIGHT BE GIVEN TO SOLVING

THIS MATTER BY AN EXCHANGE OF NOTES OR A PROTOCOL, PREFERABLY LIMITED TO AMENDING ARTICLE 13.

2. THE DEPARTMENTS OF STATE AND JUSTICE ARE CONCERNED AS TO THE APPLICATION OF THE PROVISION IN THE PENULTIMATE PARAGRAPH OF ARTICLE 2 DEALING WITH "ASSOCIACION ILICITA." IF OUR RECOLLECTION IS CORRECT,
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THIS PHRASE, INTENDED TO TRANSLATE INTO THE ARGENTINE LEGAL SYSTEM THE CONCEPT IN COMMON LAW OF "CONSPIRACY," WAS BASED ON SECTION 210 OF THE ARGENTINE PENAL CODE. CONSPIRACY, UNDER COMMON LAW AND AS IT IS USED IN THE UNITED STATES, IS AN EXTREMELY IMPORTANT OFFENSE. IT IS VERY FREQUENTLY USED IN CASES PROSECUTED BY THE FEDERAL GOVERNMENT OF THE UNITED STATES, PARTICULARLY IN NARCOTICS CASES. UNDER OUR SYSTEM, CONSPIRACY MAY BE DESCRIBED AS FOLLOWS:

A CONSPIRACY IS THE FORMING BY A COMBINATION OF TWO OR MORE PERSONS OF AN AGREEMENT FOR CONCERTED ACTION TO ACCOMPLISH A CRIMINAL OR UNLAWFUL PURPOSE, OR SOME PURPOSE NOT IN ITSELF CRIMINAL OR UNLAWFUL, BY CRIMINAL OR UNLAWFUL MEANS.

THE DEPARTMENTS OF STATE AND JUSTICE WOULD WISH TO HAVE CONSULTATIONS ON THIS OFFENSE WITH A VIEW TO ASCERTAINING THAT, TO THE GREATEST EXTENT POSSIBLE, A REQUEST FOR AN ACT WHICH CONSTITUTES CONSPIRACY TO COMMIT ANY OF THE OFFENSES MENTIONED IN ARTICLE 2 WOULD BE SUCCESSFUL. ONE OPINION HAS BEEN OBTAINED WHICH INDICATES THAT SECTION 210 OF THE ARGENTINE PENAL CODE HAS BEEN RATHER NARROWLY CONSTRUED BY THE ARGENTINE COURTS. (IF THIS IS CORRECT, THAT CONSTRUCTION MIGHT APPEAR TO LIMIT CONSPIRACY REQUESTS TO THOSE WHICH INVOLVE WHAT AMOUNTS TO "ILLEGAL GANGSTERISM," I.E., THE BANDING TOGETHER OF A GROUP OF PERSONS

("GANG") FOR THE PURPOSE OF COMMITTING CRIMES. NORMALLY

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THE GROUP WOULD BE TOGETHER FOR A PERIOD OF TIME. IN A CONSPIRACY CASE, THE TWO OR MORE PERSONS REQURIED COULD CONSPIRE TOGETHER FOR ONE OFFENSE ONLY, MAY NEVER HAVE BEEN INVOLVED IN ANY PRIOR CRIMINAL ACTIVITY, AND THUS NOT CONSTITUTE A "GANG" AS WE WOULD UNDERSTAND THAT TERM.)

3. PURSUANT TO ARTICLE 4 OF THE TREATY, EACH GOVERNMENT IS OBLIGATED TO PROSECUTE LOCALLY A PERSON WHOSE EXTRADITION HAS BEEN REQUESTED BUT THE REQUEST DENIED ON THE BASIS OF THE NATIONALITY OF THE INDIVIDUAL, PROVIDED THAT THE OFFENSE IS PUNISHABLE UNDER THE LAWS OF
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THE REQUESTED PARTY AND THAT THAT PARTY HAS APPROPRIATE JURISDICTION. THE UNITED STATES GOVERNMENT HAS RECENTLY DETERMINED THAT DUE TO DIFFERENCES BETWEEN THE COMMON LAW AND CODE SYSTEMS, IT IS INCUMBENT UPON BOTH PARTIES TO VARY IN SOME DEGREE THE TYPE, AND SOMETIMES METHOD, OF PRESENTATION OF EVIDENCE WHICH WOULD ENABLE LOCAL PROSECUTION. WE WOULD WISH TO CONSULT WITH THE GOVERNMENT OF ARGENTINA ON THIS MATTER WITH THE PURPOSE OF EXCHANG-ING INFORMATION AS TO THE STANDARD PROCEDURES USED IN LOCAL PROSECUTION. THIS IS NOT A QUESTION OF INTER-PRETATION OF THE TREATY. AS A VEHICLE FOR UNDERSTANDING THIS MATTER, WE WOULD LIKE TO PRESENT THE FACTS OF A SPECIFIC CASE SO THAT SHOULD A CASE ARISE, BOTH PARTIES TO THE TREATY WILL BE KNOWLEDGEABLE AS TO WHAT TYPE OF DOCUMENTATION MIGHT BE REQUIRED FOR LOCAL PRESECUTION.

4. THE DEPARTMENT OF STATE WILL BE CONDUCTING NEGOTIATIONS ON EXTRADITION IN THE VERY NEAR FUTURE AT A LOCATION WHICH WOULD MAKE IT CONVENIENT TO TRAVEL TO BUENOS AIRES FOR CONSULTATIONS WITH OFFICIALS OF THE GOVERNMENT OF ARGENTINA. WE WOULD HOPE THAT IT WOULD ALSO BE CONVENIENT FOR THE GOVERNMENT OF ARGENTINA TO CONSULT ON THE ABOVE MATTERS, AND WE WOULD HOPE THAT SHOULD THE AUTHORITIES OF THE GOVERNMENT OF ARGENTINA HAVE ANY ADDITIONAL POINTS WHICH WOULD BE DESIRABLE TO DISCUSS ON THE TECHNICAL LEVEL, THE ARGENTINE AUTHORITIES MIGHT RAISE ADDITIONAL POINTS OF PARTICULAR CONCERN TO THE GOVERNMENT OF ARGENTINA IN ORDER TO TAKE ADVANTAGE OF A MEETING OF TECHNICAL EXPERTS IN THE FIELD OF EXTRADITION.
END TEXT. KISSINGER

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